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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 288

ALHAMBRA TRUCKING CO., and T. T. CONNOLLY, ET AL., doing business as IPCO TRANSPORTATION COMPANY,
Appellants

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the Supreme Court of the State of California

REPLY TO MOTION BY CALIFORNIA PUBLIC UTILITIES COMMISSION TO DISMISS APPEAL

PRELIMINARY STATEMENT

The California Public Utilities Commission's "Brief in Opposition" to Appellants' Jurisdictional Statement confirms rather than refutes Appellants' basic Constitutional position that the retroactive and punitive application of a vague regulatory statute by an administrative agency, *without judicial review*, presents substantial questions of substantive and procedural due process which warrant plenary review by this Court.

Conceding that Appellants' Constitutional contentions were properly presented yet rejected in the California Supreme Court (PUC Br. 3, 13), the PUC would now justify its punitive application of

California Public Utilities Code Section 3668 by reference to federal cases (PUC Br. 5-8) never discussed or even cited in its decisions (Juris. St. 3a-12a, 17a-27a). But irrespective of the invalidity of such a belated effort to shore up a defective decision,[1] these federal cases only dramatize the fatal absence of procedural safeguards where the California PUC admittedly has "wide latitude" to impose penal sanctions so that "each case must turn on its own facts" evaluated under standards so vague that the agency itself doubts even today whether "one can say that there is a test". (PUC Br. 8-9). For in each of the ICC cases the PUC now cites, a federal *court*, either on review or in an original action, *did* consider the facts of record in light of the pertinent statutory text, legislative history, and judicial precedents, and *did* render its judgment in a fully articulated decision —even where only a prospective order rather than retroactive punishment was the sanction involved.[2]

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[1] Cf. *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943) (validity of administrative order adjudged only on grounds "upon which the record discloses that its action was based.")

[2] *Union Pacific R. Co.* v. *United States*, 313 U.S. 450 (1941) (appeal from district court injunction proceeding); *New York, New Haven & Hartford R. Co.* v. *ICC*, 200 U.S. 361 (1906) (same); *Armour Packing Co.* v. *United States*, 209 U.S. 56 (1908) (appeal from criminal conviction); *United States* v. *Union Pacific R. Co.*, 173 F. Supp. 397 (S. D. Iowa 1959) aff'd 362 U.S. 327 (1960) (civil injunction suit); *Southern Ry. Co.* v. *United States*, 186 F. Supp. 29 (N.D. Ala. 1960) (suit to enjoin or set aside ICC cease and desist order); *United States* v. *Metropolitan Lumber Co.*, 254 Fed. 335 (D. N.J. 1918) (demurrer to indictment); *United States* v. *Milwaukee Refrigerator Transit Co.*, 142 Fed. 247 (E.D. Wis. 1905) (demurrer in injunction proceeding); *United States* v. *Milwaukee Refrigerator Transit Co.*, 145 Fed. 1007 (E.D. Wis. 1906) (dismissing injunction proceeding as to shipper who paid full rates, even though intermediary transit company controlled by shipper's major stockholders received illegal rebates).

Particularly in light of the striking discrepancy between California's summary post-card "review" procedures and the genuine judicial review accorded by the federal and most state courts,[3] the PUC's punitive application of California Public Utilities Code § 3668, based on unarticulated *ad hoc* determinations, clearly raises serious questions of *substantive* due process.

And the PUC's obvious confusion (PUC Br. 10-14) as to the Constitutional minimum extent of judicial review required to satisfy *procedural* due process confirms the need for an authoritative statement by this Court at this time.

I. The Public Utilities Commission's Arguments Confirm the Unconstitutional Vagueness of California Public Utilities Code § 3668 as Applied in These Cases.

As these Appellants pointed out in their Jurisdictional Statement (pp. 6-10, 14-15, 17-18), *without contradiction by the PUC*, the instant cases arise out of the PUC's retroactive use of its unique administrative power to impose fines and penalties against two small truckers—on the basis of a limited degree of common ownership between each of them and one of their shippers, long known to the Commission, and only years later questioned as a "device" through which the shippers allegedly obtained transportation at less than tariff rates.

As the PUC cannot deny, a statute imposing penalties must be "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties," e.g, *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926). Yet the PUC brief (pp. 4-10) does not deign to discuss or distinguish any of the numerous authorities cited by Appellants in which *this Court* has invalidated punitive

[3] See cases cited in Jurisdictional Statement, pp. 21-22, nn. 9-10.

state business regulatory statutes as unconstitutionally vague (Juris. St. 14 n. 4). Even now the PUC has totally failed to articulate any meaningful standard governing its imposition of penalties in cases under California Public Utilities Code § 3668.

Significantly, the PUC cites no decisions by a California *court* construing or giving content to the vague generalities of § 3668. And, although the PUC now purports to rely on "the obvious legislative intent" claimed to permeate the statute, its brief cites no California legislative history which might shed some light on the statute's meaning.

Instead, the PUC asserts for the first time (PUC Br. 5-9) that its interpretation of Section 3668 followed federal cases decided under the Elkins Act, 49 U.S.C. § 41, which somehow imported a "plain and precise" meaning into the California statute, despite the total absence of any state judicial construction.

Actually, most of the federal cases belatedly cited by the PUC did not involve shipper-carrier affiliations *at all*, and *none* adjudged a shipper's mere ownership interest in a carrier to be a forbidden "device" so long as the shipper, as here, paid the full tariff rate. And cf. *United States* v. *South Buffalo Ry. Co.*, 333 U.S. 771, 785 (1948) (holding company's 100% ownership of carrier and its major shipper permitted under "commodities clause," 49 U.S.C. § 1(8), where subsidiary's separate identity "preserved in form and substance").[4]

[4] Also, nothing in the federal cases suggests that even the shipper's actual receipt of an affiliated carrier's profits, for example through dividends or other normal incidents of ownership, would constitute a "device." By contrast, the California PUC has held that any increase in the carrier's income automatically "inures to the benefit" of the shipper even where, as here, there are *no* "dividends, distributions of capital" or other payments to the shipper (Juris. St. 7a, 21a).

The Elkins Act cases cited by the PUC, moreover, were all *judicial* proceedings in which the federal courts, on judicial review or in original actions, *did* carefully analyze the facts before them in light of statutory language, legislative history, and previous judicial precedents, before adjudging, in carefully articulated opinions, whether or not a violation had occurred.[5] Thus, even apart from the remoteness of these cases to the facts at bar, and the lack of any warning in any PUC pronouncement that carriers must follow the federal courts' standards on pain of administrative penalties *in California*, none of the federal precedents even suggest that any agency, let alone a state commission, has "wide latitude" (PUC Br. 8) to impose penal sanctions in the absence of discernible criteria or principles.

The painstaking approach of the federal courts in these Elkins Act proceedings stands in sharp contrast to the California PUC's arbitrary fiat here. The PUC's mechanical citation of its own inapposite *Soule* decision in the instant cases (Juris. St. 7a, 21a) does not even reveal "the discerning line for decision of the basic issue in the case," *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 657 (1964), let alone provide a meaningful standard for those carriers who wish to avoid punitive agency action in the future.[6]

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[5] See note 2 *supra*.

[6] As the PUC does not deny, the instant cases present widely differing fact situations. Appellant Alhambra, for example, used subhaulers on less than 8% of its $100,000 a year business which was primarily carried by its own trucks and drivers, negating any intent "to circumvent § 3668 and evade minimum rates illegally," as dissenting Commissioner Mitchell pointed out (Juris. St. 14a). Appellant IPCO, on the other hand, is a limited partnership, only 24% owned by three individuals who own less than 50% of the stock of a shipper (Juris. St. 6). Yet the PUC imposed identical fines on each Appellant on the basis of virtually identical boiler-

Actually, the PUC *even now* disclaims *any* standard in its application of § 3668. Arguing that it "should not be harnessed with a strict administrative test" (PUC Br. 8), its brief sets forth at least three different and conflicting interpretations of the statute:

(1) Thus, it first suggests (PUC Br. 3) that whenever "the shipper and the prime carrier are affiliated" in any way, any lower rates charged the prime carrier by a subhauler "inure to the benefit" of the shipper, and thus violate § 3668—a *per se* test which flouts the legislative decision not to outlaw shipper-carrier affiliations (Juris. St. 18, 13a-14a).

(2) Alternatively, the PUC contends (PUC Br. 3) that the statute is violated only "if there exists such a unity of ownership interest and control between the shipper and the alleged prime carrier that it can be said that the latter is only an ostensible prime carrier" —a test which implies a thorough factual analysis totally absent in the decisions under review.

(3) Finally, the PUC asserts (PUC Br. 9) that "*to the extent that one can say that there is a test*", it is simply "whether the shipper has obtained transportation of its property at less than the prescribed minimum rates"—a tautological and hence useless restatement of the statute itself.

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plate opinions, each of which recited only that "the facts here are sufficiently similar to the facts" of its *Soule* decision "to warrant reaching the same result" (Juris. St. 7a, 21a). Yet, as the PUC's silence on brief confirms, the *Soule* case concerned "a 'carrier' which owned *no* equipment and was a *100% subsidiary* of its only shipper" (Juris. St. 8). Thus the finding that subhaulers' lower rates "inured to the benefit" of the shipper, while appropriate in *Soule*, provides no guidelines as to what *other* shipper-carrier relationships may be singled out for punitive sanctions in the future.

Whatever deference may be due the expertise of those administrative agencies whose fully articulated opinions inform and guide those subject to regulation, cf. *United States* v. *Drum*, 368 U.S. 370, 384 (1962), is clearly not due where an agency cannot explain its reasoning in its decision or even in its briefs before this Court. And, where these unfathomable standards carry harsh and punitive sanctions imposed by fiat, important substantive due process questions inevitably arise.

II. The PUC's Brief Underscores the Need for a Clear Pronouncement By This Court Defining the Extent to Which Procedural Due Process Requires Judicial Review of Punitive State Agency Action.

Aggravating the PUC's failure to articulate any meaningful standards governing its punitive applications of § 3668 is the absence of any California judicial precedent construing that provision. For unlike the federal courts, which have a "duty to canvass the whole record of the proceeding before the [Interstate Commerce] Commission", *Southern R. Co.* v. *United States*, 186 F. Supp. 29, 33 (N.D. Ala. 1960), the California Supreme Court has refused to provide any review procedure capable of guidance or check on the California PUC's actions in this type of case.

Notwithstanding the PUC's misreading of the precedents (PUC Br. 11-13), *no federal court* has *ever* held that the California Supreme Court's summary denials of review suffice to provide the minimal Constitutional requirements of procedural due process to a party subjected to punitive sanctions on the basis of vague administrative interpretations. Indeed, *Napa Valley*

and its kindred cases,[7] which hold only that the California Supreme Court's denial of review is *res judicata* as to all issues subsumed in the PUC's decision, underscore the absence of meaningful judicial review by the *only* California judicial tribunal empowered to review the PUC's proceedings.[8]

Far from establishing that judicial review of punitive state agency actions is *not* required, the PUC's brief (pp. 10-14) highlights the confusion among judges, scholars, and practitioners alike (see Juris. St. 21-24), which cries out for an authoritative definition by this Court of the extent to which procedural due process requires some form of meaningful judicial review of state administrative sanctions.[9]

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[7] *Napa Valley Electric Co.* v. *Railroad Commission of State of California*, 251 U.S. 366 (1920); *Southern Pacific Co.* v. *Van Hoosear*, 72 F. 2d 903 (9th Cir. 1934); *Consolidated Freightways, Inc.* v. *Railroad Commission of California*, 36 F. Supp. 269 (N. D. Cal. 1941). Actually, despite the mandatory direction of the governing statute (California Public Utilities Code § 1756) that the writ of review "*shall* be made returnable" within 30 days and "*shall* direct the Commission to certify its record in the case to the court" whereupon "the cause *shall* be heard," the California Supreme Court has felt free to deny review without benefit of *either* the record *or* a hearing.

[8] This case thus differs from *Lehigh Valley R. R. Co.* v. *Public Utility Commissioners*, 278 U.S. 24, 40-41 (1928), where this court upheld New Jersey's certiorari procedure for review of PUC regulatory actions on the assumption that the state court of equity would be available if this procedure proved inadequate to protect federal Constitutional rights. Under California Public Utilities Code § 1759, however, *no* California Court except the Supreme Court may "review, reverse, correct, or annul" the California PUC's decisions.

[9] The PUC's suggestion (PUC Br. 13-14) that judicial review is essential only in so-called "legislative" rate-making cases obviously rests on a misreading of *Crowell* v. *Benson*, 285 U.S. 22 (1932), a longshoremen's compensation case where judicial review was held

Finally, it is absurd to suggest that meaningful review would require the California courts to become "fact-finding bodies" (PUC Br. 12). Compare *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 488-490 (1951) (reviewing court must keep agency "within reasonable grounds" based on "substantial evidence" in light of "all that the record relevantly presents"); 4 DAVIS, ADMINISTRATIVE LAW TREATISE, § 28.19, p. 102 (1958) (advocating "substantial evidence" review in lieu of "independent judicial determinations of questions of fact").

Above all, the PUC's brief shows no discernment of the procedural significance of its novel *administrative* power to impose retroactive penal sanctions. For if *any* jural distinction exists between rate-making cases, where the PUC apparently concedes (PUC Br. 13-14) that a Constitutional right to judicial review exists notwithstanding their complex records requiring utmost agency expertise, and the instant punitive actions where conventional legal principles rule, surely the latter require *more* rather than *less* meaningful judicial review. See Bell, *Utility Appeals, Review or Rubberstamp*, ABA Public Utility Law Sec. Rep. 37 (1963); cf. *Winters* v. *New York*, 333 U.S. 507, 515

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essential to due process. Its further reliance (PUC Br. 14) on Justice Brandeis' "enlightening" assertion that "due process is not necessarily judicial process" is unilluminating on its face, and ignores Justice Brandeis' further statement that "when dealing with constitutional rights" there must be "an opportunity of presenting in an appropriate proceeding, at some time to some court, every question of law raised." *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 77 (1936) (concurring opinion). Moreover, in five of the six cases cited to support Brandeis' suggestion that judicial review may not always be constitutionally required, some form of judicial review or other judicial determination *was in fact available*, and in the sixth no prejudicial error by the administrative body was alleged.

(1947) (requiring higher standard of clarity in penal statutes).

CONCLUSION

Nothing in the PUC's brief has dispelled the substantial federal questions arising from the decisions below which warrant plenary resolution by this Court. On the contrary, the PUC's insistence on "wide latitude" to impose penal sanctions without effective judicial review (PUC Br. 8) confirms the need for an authoritative pronouncement defining the extent to which the Constitution permits such unchecked action by a state commission. Compare Jaffe, *The Right to Judicial Review Parts I, II*, 71 Harv. Law Rev. 401, 769, 808 (1958); 4 DAVIS, ADMINISTRATIVE LAW TREATISE, § 28.21, pp. 112-113 (1958).

Appellants respectfully urge, therefore, that the Court permit this case to be heard on the merits.

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